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4 ALISON COLE-KELLY,  
5 Plaintiff,  
6 v.  
7 BETTY T. YEE, et al.,  
8 Defendants.

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10 ALEXANDER COTE,  
11 Plaintiff,  
12 v.  
13 OFFICE OF THE CALIFORNIA STATE  
14 CONTROLLER, et al.,  
15 Defendants.

16  
17 JENNIFER I. SYKES,  
18 Plaintiff,  
19 v.  
20 OFFICE OF THE CALIFORNIA STATE  
21 CONTROLLER, et al.,  
22 Defendants.

23 Case No. [22-cv-02841-HSG](#)  
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**ORDER GRANTING DEFENDANTS'  
MOTIONS TO DISMISS**

Re: Dkt. Nos. 16, 24, 23, 35

Case No. [22-cv-04056-HSG](#)

Re: Dkt. No. 32

Case No. [22-cv-04133-HSG](#)

Re: Dkt. No. 23

Pending before the Court are Defendants' motion to dismiss (Dkt. No. 23) in *Cole-Kelly v. Yee*, 22-cv-02841-HSG ("Cole-Kelly"); Defendants' motion to dismiss (Dkt. No. 32) in *Coté v. Office of the California State Controller*, 22-cv-04056-HSG ("Coté"); and Defendants' motion to dismiss (Dkt. No. 23) in *Sykes v. Office of the California State Controller*, 22-cv-04133-HSG. Also pending before the Court are the *Cole-Kelly* Plaintiffs' motion for partial summary judgment (Dkt. No. 35), Plaintiffs' motion to certify class (Dkt. No. 16), and Plaintiffs' motion to

1 consolidate related cases and appoint class counsel (Dkt. No. 24). The Court finds this matter  
2 appropriate for disposition without oral argument and the matter is deemed submitted. *See Civil*  
3 L.R. 7-1(b). The Court **GRANTS** Defendants' motions to dismiss and **TERMINATES AS**  
4 **MOOT** the *Cole-Kelly* Plaintiffs' motion for partial summary judgment, motion to certify class,  
5 and motion to consolidate related cases and appoint class counsel.

## 6 I. FACTUAL BACKGROUND

7 *Cole-Kelly*, *Coté*, and *Sykes* are three related putative class actions that challenge the  
8 constitutionality of California's Unclaimed Property Law ("UPL"), C.C.P. § 1500 *et seq.*, under  
9 the United States Constitution and the California Constitution.<sup>1</sup> As alleged in the *Coté* complaint,  
10 "[t]he UPL applies to unclaimed property that is held by a third party, for example, a bank,  
11 insurance company, corporation, or public utility. Unclaimed property is generally defined as any  
12 financial asset left inactive by its owner for a period of time, typically three (3) years. Under the  
13 UPL . . . such property is temporarily transferred to the custody of the State." *Coté* Dkt. No. 1 at  
14 ¶ 17. Plaintiffs further allege that the UPL "is not a true escheat statute; it gives the State custody,  
15 not ownership, of unclaimed property." *Id.* Third parties are required to self-report any unclaimed  
16 property and "transfer property to the State once the property meets the UPL's definition of  
17 unclaimed property and pay the State interest at the rate of twelve percent (12%) per annum for  
18 property not timely reported or delivered." *Id.* ¶ 19. According to the *Coté* plaintiffs, "[t]he State  
19 collects hundreds of millions of dollars in unclaimed or abandoned property annually but returns  
20 just a fraction of that amount to the property owners. The State retains and uses the interest,  
21 dividends, accruals, earnings, investment returns, and other benefits earned on and from unclaimed  
22 property for public purposes." *Id.* ¶ 20. The *Coté* complaint alleges that "the Controller does not

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24 <sup>1</sup> The *Cole-Kelly* complaint brings three claims: 1) claim for declaratory and prospective  
25 injunctive relief on behalf of plaintiff and the class: unconstitutionality under 5<sup>th</sup> Amendment, 2)  
26 claim for declaratory and prospective injunctive relief on behalf of plaintiff and the class:  
27 unconstitutionality under Article I, Section 19, and 3) violation of equal protection and due  
process (42 U.S.C. § 1983). *See generally Cole-Kelly* Dkt. No. 1. The *Coté* and *Sykes* complaints  
bring the same two claims: 1) claim for declaratory and prospective injunctive relief on behalf of  
plaintiff and the class for violation of the Fifth and Fourteenth Amendments of the U.S.  
Constitution, 2) claim for declaratory and injunctive relief on behalf of plaintiff and the class for  
violation of Article I, Section 19 of the California Constitution. *See generally Coté* Dkt. No. 1;  
*Sykes* Dkt. No. 1.

1 pay interest, dividends, accruals, earnings, investment returns, or other benefits above the original  
2 amount of the unclaimed property to the owner or person entitled to recover the unclaimed  
3 property and is prohibited by statute from doing so.” *Id.* ¶ 21. For this reason, the *Coté* complaint  
4 alleges that “[t]he State deprives Plaintiff and all other Class members of just compensation on  
5 unclaimed or abandoned property it uses for public purposes.” *Id.* ¶ 22. The *Cole-Kelly* and *Sykes*  
6 complaints make similar allegations. *See Cole-Kelly* Dkt. No. 1 ¶¶ 10-38; *Sykes* Dkt. No. 1 ¶¶ 17-  
7 22.

8 The central allegation in all three cases is that the UPL is unconstitutional under both the  
9 United States Constitution and the California Constitution because it unconstitutionally deprives  
10 property owners of any “time value”<sup>2</sup> accrued by their property during the time it is controlled by  
11 the State. Accordingly, the constitutionality of the UPL is a dispositive issue in all three cases.

## 12 II. **LEGAL STANDARD**

13 Federal Rule of Civil Procedure 8(a) requires that a complaint contain “a short and plain  
14 statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). A  
15 defendant may move to dismiss a complaint for failing to state a claim upon which relief can be  
16 granted under Rule 12(b)(6). “Dismissal under Rule 12(b)(6) is appropriate only where the  
17 complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory.”  
18 *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). To survive a Rule  
19 12(b)(6) motion, a plaintiff need only plead “enough facts to state a claim to relief that is plausible  
20 on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible  
21 when a plaintiff pleads “factual content that allows the court to draw the reasonable inference that  
22 the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

23 In reviewing the plausibility of a complaint, courts “accept factual allegations in the  
24 complaint as true and construe the pleadings in the light most favorable to the nonmoving party.”

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26 <sup>2</sup> Plaintiffs in all three cases refer to the concept of “time value.” *See e.g., Cole-Kelly* Dkt. No. 40  
27 (“Opp.”) at 1; *Sykes* Dkt. No. 38 (“Opp.”) at 13; *Coté* Dkt. No. 49 (“Opp.”) at 13. For clarity, the  
28 Court will refer to “interest” throughout this order. Although the Court understands that “time  
value” may include other forms of appreciation—such as dividends, accruals, or other earnings—it  
finds that this does not change the analysis or outcome.

1        *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). Nevertheless,  
2        courts do not “accept as true allegations that are merely conclusory, unwarranted deductions of  
3        fact, or unreasonable inferences.” *In re Gilead Scis. Secs. Litig.*, 536 F.3d 1049, 1055 (9th Cir.  
4        2008) (quoting *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001)).

5           Even if the court concludes that a 12(b)(6) motion should be granted, the “court should  
6        grant leave to amend even if no request to amend the pleading was made, unless it determines that  
7        the pleading could not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203  
8        F.3d 1122, 1127 (9th Cir. 2000) (en banc) (quotation omitted).

9        **III. DISCUSSION**

10        **A. Three-Judge Panel**

11           As a preliminary matter, the *Cole-Kelly* Plaintiffs argue that Defendants’ motion to dismiss  
12        and Plaintiffs’ motion for partial summary judgment in *Cole-Kelly* should be decided by a three-  
13        judge panel under 28 U.S.C. § 2284. *Cole-Kelly* Opp. at 20-21. Section 2284 provides that three-  
14        judge panel “shall be convened when otherwise required by Act of Congress, or when an action is  
15        filed challenging the constitutionality of the apportionment of congressional districts or the  
16        apportionment of any statewide legislative body.” 28 U.S.C. § 2284. This case does not involve  
17        the apportionment of congressional districts or a statewide legislative body so, under § 2284,  
18        Plaintiffs must identify an applicable “Act of Congress” that requires a three-judge panel. In  
19        support of their request, Plaintiffs argue that “[w]here, as here, an action seeks to establish the  
20        unconstitutionality of a state statute and to enjoin the state and its officers from enforcing that  
21        allegedly unconstitutional statute, a party can move, pursuant to 28 U.S.C. § 2284, to have a three-  
22        judge district court panel decide the issues.” *Cole-Kelly* Opp. at 20-21. The two cases Plaintiffs  
23        cite in support both concern 28 U.S.C. § 2281, which stated:

24           An interlocutory or permanent injunction restraining the enforcement, operation or  
25        execution of any State statute by restraining the action of any officer of such State in the  
26        enforcement or execution of such statute or of an order made by an administrative board  
27        or commission acting under State statutes, shall not be granted by any district court or  
judge thereof upon the ground of the unconstitutionality of such statute unless the  
application therefor is heard and determined by a district court of three judges  
under section 2284 of this title.

28        *Hicks v. Miranda*, 422 U.S. 332, 342 n.12 (1975) (quoting 28 U.S.C. § 2281 (repealed 1976)); *see*

1       also *Fla. Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73, 79-80 (1960).

2              Section 2281, however, was repealed in 1976. See 28 U.S.C. § 2281 (repealed 1976); see  
3       also *Tedards v. Ducey*, 951 F.3d 1041, 1060 n.37 (9th Cir. 2020) (stating that “[In 1968],  
4       Congress required that any case seeking an injunction against a state officer to prevent  
5       enforcement of an allegedly unconstitutional state statute be heard by a special three-judge district  
6       court,” but noting in the citation to the statute that it was “repealed 1976”); *Larry P. By Lucille P.*  
7       *v. Riles*, 793 F.2d 969, 978 n.4 (9th Cir. 1984) (explaining that § 2281 “was repealed in 1976”).

8              The Court knows of no current authority or other basis on which it could grant Plaintiffs’  
9       request, and Plaintiffs point to none. Accordingly, Plaintiffs’ request for a three-judge panel is  
10      **DENIED.**

11              **B. Sovereign Immunity**

12              Defendants argue in the *Cole-Kelly* motion to dismiss that “any claims against the State of  
13       California and its agencies are barred by the Eleventh Amendment.” *Cole-Kelly* Mot. at 8.  
14              Defendants further argue that because “officials sued in their official capacities are not persons  
15       within the meaning of § 1983 . . . a plaintiff is barred from suing defendants in their official  
16       capacities for money damages, absent congressional abrogation or waiver of sovereign immunity.”  
17       *Id.* at 8-9 (quotations omitted). The Defendants make similar arguments in the *Coté* and *Sykes*  
18       motions to dismiss. See *Coté* Mot. at 9-10; *Sykes* Mot. 9-10. The *Sykes* and *Coté* Plaintiffs argue  
19       that “the Eleventh Amendment does not bar claims for prospective injunctive relief to remedy a  
20       state’s ongoing violations of federal law.” *Coté* Opp. at 16; *Sykes* Opp. at 16. The *Cole-Kelly*  
21       Plaintiffs also argue that “the interest (or time value) on the unclaimed property is the property of  
22       the owners, not the State” so “Plaintiffs’ claim for a return of their interest is a claim for a return  
23       of their property, and not a claim for damages against the state.” *Cole-Kelly* Opp. at 20 (footnotes  
24       and citations omitted); see also *Coté* Opp. at 17 (making similar arguments); *Sykes* Opp. at 17  
25       (same). The *Coté* and *Sykes* Plaintiffs further argue that “even if retrospective relief would be  
26       sought, the self-executing aspect of the Fifth Amendment provides relief.” *Coté* Opp. at 16; *Sykes*  
27       Opp. at 16.

28              The Ninth Circuit addressed sovereign immunity in the context of claims for interest in

1        *Suever II*: “while the Eleventh Amendment is no bar to Plaintiffs’ claims for return of their  
2 escheated principal and the sales proceeds therefrom, state sovereign immunity clearly precludes  
3 Plaintiffs from successfully obtaining *more* than that amount in the form of interest . . . .” *Suever*  
4 *v. Connell (Suever II)*, 579 F.3d 1047, 1059 (9th Cir. 2009) (emphasis in original).

5        Plaintiffs’ argument that their claim for a return of the interest is a claim for the return of  
6 *their* property (and therefore not barred by the Eleventh Amendment) is foreclosed by the  
7 reasoning in *Turnaciff* regarding the interest earned by unclaimed or abandoned property. In  
8 *Turnaciff*, Plaintiffs argued, in part, that “the Controller’s action ran afoul of the Takings Clause  
9 of the Fifth Amendment, because he did not pay to the Estate the actual interest that the unclaimed  
10 property earned while California held it.” *Turnaciff v. Westly*, 546 F.3d 1113, 1115 (9th Cir.  
11 2008). The court acknowledged that in a previous case it had held that “prisoners possess a  
12 constitutionally cognizable property right in the interest earned on the principal held in Inmate  
13 Trust Accounts.” *Id.* at 1119 n.3 (citing *Schneider v. Cal. Dep’t of Corr.*, 151 F.3d 1194, 1201  
14 (9th Cir. 1998)). The court discussed *Schneider*’s holding that “[t]he ‘interest follows principal’”  
15 rule’s common law pedigree, and near-universal endorsement by American courts—including  
16 California’s’ left us with ‘little doubt that interest income of the sort at issue’ [there] was  
17 ‘sufficiently fundamental that States may not appropriate it without implicating the Takings  
18 Clause.’” *Id.* (quoting *Schneider*, 151 F.3d at 1201). The *Turnaciff* court, however, also stated  
19 that “[b]y contrast, we are unaware of . . . any authority for the proposition that interest earned by  
20 unclaimed or abandoned property belongs to the property owner.” *Id.*

21        Given the Ninth Circuit’s statement in *Turnaciff*, this Court declines to find that the  
22 interest earned by unclaimed or abandoned property belongs to the property owner. Consequently,  
23 Plaintiffs’ claims for the payment of any interest accrued by their property while the property was  
24 in State custody are barred by the Eleventh Amendment. *Suever II*, 579 F.3d at 1059 (explaining  
25 that “Plaintiffs are not entitled to *more* than the actual property that the State took into its  
26 possession or the proceeds of that property . . . . Rather, such claims for additional compensation,  
27 whether described as ‘restitution’ or otherwise, are indistinguishable in effect from claims for  
28 money damages against the State and, as such, are barred by the Eleventh Amendment” (emphasis

1 in original) (quotations omitted)).<sup>3</sup>

2       **C. Constitutionality of UPL**

3           To the extent that any of Plaintiffs' claims are not barred by the Eleventh Amendment,  
 4 these claims fail to state a claim upon which relief can be granted because the claims are not  
 5 tenable under current Ninth Circuit law.

6           The Ninth Circuit has "squarely rejected the proposition that property owners have a  
 7 compensable Fifth Amendment right to interest earned on unclaimed property that escheats to the  
 8 State of California." *Suever II*, 579 F.3d at 1056.<sup>4</sup> It has stated that "insofar as [a district court's]  
 9 order requires prospective payment of interest, or payment of interest on any claims for unclaimed  
 10 property that escheated under the *current* version of the UPL . . . *Turnaciff* requires reversal." *Id.*  
 11 1057 (emphasis added).<sup>5</sup> The Court has also explicitly stated that "[a]s previously noted, we have  
 12 declared that the current version of the UPL is facially constitutional." *Id.*

13           The Ninth Circuit could not be more clear: Plaintiffs' claims are not legally viable. If  
 14 Plaintiffs want to change Ninth Circuit law, they will have to persuade an en banc panel of that  
 15 court to do so.<sup>6</sup>

16  
 17       <sup>3</sup> The *Cole-Kelly* Plaintiffs argue that "*Suever* and *Turnaciff* are not the law of the circuit" based  
 18 on the Supreme Court's decision in *Liu v. Securities and Exchange Commission*, 140 S. Ct. 1936,  
 19 1946 (2020). See *Cole-Kelly* Opp. at 19-20. *Liu* involved a civil enforcement action brought by  
 20 the SEC. The Court held "that a disgorgement award that does not exceed a wrongdoer's net  
 21 profits and is awarded for victims is equitable relief permissible under" a statute "that historically  
 22 exclude[d] punitive sanctions." *Liu*, 140 S. Ct. at 1940. Given the different context of the *Liu*  
 23 case and its holding, Plaintiffs have not met the high standard of "clear irreconcilability" required  
 24 before district courts can "consider themselves bound by the intervening higher authority and  
 25 reject the prior opinion of [the Ninth Circuit] as having been effectively overruled." *Miller*  
*v. Gammie*, 335 F.3d 889, 899-900 (9th Cir. 2003) (en banc).

26       <sup>4</sup> The *Coté* and *Sykes* Plaintiffs argue that "[t]he law has developed since the Ninth Circuit Court  
 27 of Appeals determined that owners of unclaimed property have no Fifth Amendment right to  
 28 interest itself actually earned on their property while held by the State . . ." *Coté* Opp. at 2; *Sykes*  
 Opp. at 2. However, the cases cited by Plaintiffs are out-of-circuit cases that have no precedential  
 value within the Ninth Circuit, and cannot override this circuit's decisions on the question.

29       <sup>5</sup> *Suever II* was decided in 2009, well after the law's 2003 amendment. See *Cole-Kelly* Opp.  
 30 (explaining that the current version of § 1540(c) was enacted in 2003).

31       <sup>6</sup> The Court finds that Plaintiffs' claims that the alleged taking also violated the due process and  
 32 equal protection provisions of the Constitution are derivative and fail for the same reason. See  
 33 *Cole-Kelly* Dkt. No. 1 ¶ 73 ("The California Controller and Treasurer violated Plaintiff's and the  
 34 Classes' due process and equal protection rights, by taking Plaintiff's and the Class's property  
 35 without just compensation, thereby causing harm to Plaintiff and the Class."); *Coté* Dkt. No. 1  
 36 ¶ 52 ("The UPL violates the Fifth and Fourteenth Amendments of the United States Constitution  
 37 in that it directs that unclaimed property transferred to the custody of the Controller must be paid

1           **IV. CONCLUSION**

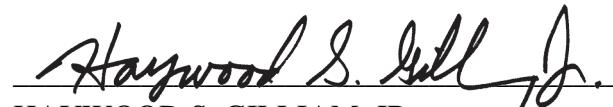
2           Because the “pleading[s] could not possibly be cured by the allegation of other facts,” *Lopez*,  
3 203 F.3d at 1127 (quotation omitted), the Court **GRANTS WITHOUT LEAVE TO AMEND**  
4 Defendants’ motions to dismiss: Dkt. No. 23) in *Cole-Kelly*, Dkt. No. 32 in *Coté*, and Dkt. No. 23  
in *Sykes*.

5           This order also **TERMINATES AS MOOT** Plaintiffs’ motion for partial summary judgment  
6 (Dkt. No. 35), Plaintiffs’ motion to certify class (Dkt. No. 16), and Plaintiffs’ motion to  
7 consolidate related cases and appoint class counsel (Dkt. No. 24) in *Cole-Kelly*.

8           The Clerk is directed to enter judgment in favor of Defendants and to close the three cases.

9           **IT IS SO ORDERED.**

10          Dated: 3/13/2023

11            
12          HAYWOOD S. GILLIAM, JR.  
13          United States District Judge

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23          to the State’s General Fund and used by the State for public purposes without the payment of just  
compensation to property owners, upon claiming the property, for the State’s use of that property  
while in its custody for public purposes.”); *Sykes* Compl. ¶ 52 (same).

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28          Defendants point out that “[a]side from a provision in California’s Constitution proscribing  
‘damage’ to property without compensation, the Takings Clauses in the United States and  
California Constitutions have been construed ‘congruently.’” *Coté* Mot. at 3 n.1 (quoting *San  
Remo Hotel L.P. v. City and County of San Francisco*, 27 Cal. 4th 643, 664 (2002)); *Sykes* Mot. at  
3 (same); *Cole-Kelly* Mot. at 3 n.2 (same). The *Coté* and *Sykes* Plaintiffs agree, and the *Cole-  
Kelly* Plaintiffs do not argue otherwise. *See Coté* Opp. at 1 n.2; *Sykes* Opp. at 1 n.2; *see generally Cole-  
Kelly* Opp. The Court therefore finds that Plaintiffs’ claims under Article I, Section 19 of the  
California Constitution also fail for the same reason.